

July 17, 2008

DECISION AND ORDER  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 26, 2007

Case Number: TSO-0555

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”<sup>1</sup> A local DOE Security Office suspended the individual’s access authorization pursuant to the provisions of Part 710. In this Decision, I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual’s access authorization should be granted. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the DOE should not grant the individual access authorization at this time.

**I. Background**

The individual is an employee of a DOE contractor and held an access authorization when previously employed by the same contractor from 2002 to 2004. On November 20, 2006, the contractor requested that the DOE again grant the individual access authorization. Exhibit 7. On December 20, 2006, the individual signed a Questionnaire for National Security Positions (QNSP) in which he revealed that he had used illegal drugs during the period May 2004 to January 2005, including a two-month period while he previously held a DOE security clearance. As a result of this revelation, the DOE local office conducted a Personnel Security Interview (PSI) with the individual on February 8, 2007. *See* Exhibit 21. The DOE local office ultimately determined that the derogatory information concerning the individual created a substantial doubt about his eligibility for an access authorization, and that the doubt could not be resolved in a manner favorable to him. Accordingly, the DOE local office proceeded to obtain authority to initiate an administrative review proceeding.

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<sup>1</sup> Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

The administrative review proceeding began with the issuance of a Notification Letter to the individual. *See* 10 C.F.R. § 710.21. That letter informed the individual that information in the possession of the DOE created a substantial doubt concerning his eligibility for access authorization. Specifically, the DOE characterized this information as indicating that the individual has trafficked in, sold, transferred, possessed, used, or experimented with a drug or other controlled substance except as prescribed or administered by a physician or otherwise authorized by Federal law, Exhibit 1 (citing 10 C.F.R. § 710.8(k)), and that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation, or duress which may cause him to act contrary to the best interests of the national security. *Id.* (citing 10 C.F.R. § 710.8(l)).

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt regarding his eligibility for access authorization. The individual requested a hearing, and the DOE local office forwarded the individual's request to the Office of Hearings and Appeals (OHA). The Director of OHA appointed me as the Hearing Officer in this matter on January 29, 2008.

At the hearing I convened pursuant to 10 C.F.R. § 710.25(e) and (g), I took testimony from the individual, his former supervisor, a coworker with whom the individual had socialized outside of work, and a licensed clinical and forensic psychologist. The DOE Counsel submitted 23 exhibits prior to the hearing, and the individual's attorney presented two exhibits.

## **II. Regulatory Standard**

A hearing under Part 710 is held "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization," i.e., "to have the substantial doubt regarding eligibility for access authorization resolved." 10 C.F.R. § 710.21(b)(3), (6). It is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

## **III. Findings of Fact**

The relevant facts in this case are not in dispute. The individual was 28 years old in 2002 when, having recently received his Ph.D., he began a two-year post-doctoral appointment at a DOE contractor facility. Exhibit 12 at 2; Hearing Transcript [hereinafter Tr.] at 36. As part of the process of applying for access authorization, the individual completed a QNSP on March 18, 2002. On that form, the individual admitted to prior use of marijuana, cocaine, MDMA (ecstasy), and LSD at various times from 1993 through 2001. Exhibit 12 at 8. Though his past drug use was extensive in its variety and length, and took place as recently as three months prior

to the completion of the QNSP (use of ecstasy as recent as December 2001), *id.*, the DOE granted access authorization to the individual on November 19, 2002. Exhibit 15.

However, prior to granting the clearance, the DOE required the individual to sign a Security Acknowledgement and a Drug Certification. In the Security Acknowledgement, the individual acknowledged, among other things, that the use of any illegal drug could result in the loss of his DOE access authorization. Exhibit 9. The Drug Certification stated, in pertinent part:

Unless lawfully prescribed for my use by a licensed physician, I agree that I will not buy, sell, accept as a gift, experiment with, traffic in, use, possess or be involved with the illegal drugs cited above [narcotics, hallucinogens, and other drugs listed in the Controlled Substances Act] at any time, in any country, in any job in which I have been given a DOE access authorization.

Exhibit 8.

Between May 2004 and July 16, 2004, the individual used illegal drugs while holding a DOE security clearance. Tr. at 32-33; Exhibit 15. At the hearing, the individual testified at one point that he thought he used cocaine "two times" and marijuana "two or three times" while holding a security clearance. Tr. at 57. Later, he testified that he knows he used marijuana more than once, but less than five times. *Id.* The individual also admitted to using illegal drugs after he left the employ of the DOE contractor in July 2004 until January 2005. The individual's total illegal drug use between May 2004 and January 2005 was 10 times for marijuana and four times for cocaine. *Id.* at 32-33; Exhibit 15.

In December 2006, the individual returned to work for the DOE contractor, this time in a permanent position. Exhibit 11 at 7. The contractor requested reinstatement of the individual's access authorization, and the individual completed a new QNSP on December 20, 2006. Tr. at 14, 19. In the new QNSP, the individual fully disclosed both his drug use prior to his earlier tenure with the contractor and his more recent use from May 2004 to January 2005. Exhibit 11 at 23-24.

#### **IV. Analysis**

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).<sup>2</sup> After due deliberation, I have determined that the

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<sup>2</sup> Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding his conduct, to include knowledgeable participation, the frequency and recency of his conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for his conduct, the potential for

individual's access authorization should not be granted. The specific findings that I make in support of this decision are discussed below.

#### **A. Basis for Security Concerns Under Criteria K and L**

The Criterion K security concerns at issue here are predicated on the following allegations set forth in the Notification Letter: (1) the individual used marijuana from once a month to one to two times per week between 1993 and February 2001, and approximately 10 times between May 2004 and February 2005; (2) he used cocaine approximately 10 times in 1999 or 2000, and approximately four times between May 2004 and February 2005; (3) he used MDMA (ecstasy) approximately six to 10 times between 1998 and 2001; (4) he used LSD approximately seven to eight times between 1994 and October 2000; and (5) he admitted to purchasing marijuana, LSD, and MDMA during his periods of use. Exhibit 1 (citing 10 C.F.R. § 710.8(k)).

Cited as bases for a security concern under Criterion L were the following allegations: (1) the individual used marijuana and cocaine between May 2004 and July 16, 2004, while in the possession of a DOE access authorization, despite signing a Security Acknowledgment on March 18, 2002, indicating that he understood that his involvement with any illegal drug could result in the loss of his DOE access authorization; and (2) he used marijuana and cocaine between May 2004, and July 16, 2004, while holding a DOE access authorization, in violation of a DOE Drug Certification form that he signed on November 14, 2002. *Id.* (citing 10 C.F.R. § 710.8(l)).

I find that the information set forth above constitutes derogatory information that raises legitimate questions regarding his eligibility for access authorization under Criterion K and L. Regarding Criterion K, there are significant security concerns associated with illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules, and regulations. *See* Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House at paras. 24-25 (Guideline H). Second, drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.*

As for Criterion L, "violation of a promise to DOE to refrain from the illegal use of drugs is a serious matter. It constitutes a violation of the trust upon which the DOE security program is based. Persons who violate such an important promise are more likely to violate the rules governing the safeguarding of classified information." *Personnel Security Review* (Case No. VSA-0229), <http://www.oha.doe.gov/cases/security/vsa0229.htm> (1999); *see* Revised Adjudicative Guidelines at paras. 15-16 (Guideline E). Moreover, an individual who uses illegal drugs "may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security," 10 C.F.R. § 710.8(l), both

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pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

because of the impact of drug use on the individual's judgment, and because of the individual's susceptibility to blackmail by those who could threaten to expose the individual's illegal activity.

## **B. Hearing Testimony**

### **1. The Individual**

The individual's testimony at the hearing provided some insight regarding two of the factors I must consider under the Part 710 regulations, the motivation for and circumstances surrounding his illegal drug use, particularly his more recent use from May 2004 to January 2005. *See* 10 C.F.R. § 710.7(c); Guideline H of the Revised Adjudicative Guidelines, *supra*. The individual stated that he had "tried to figure out my motivations" and reflected on his drug use prior to 2002 as part of where he "was at the time and the people I was associated with, you know, and it's just a very exploratory time, you know, you're at the university, you're learning all these great new things, you're meeting people that you never would have met in your town that you come from, . . ." *Tr.* at 59. He stated that his more recent drug use from May 2004 to January 2005 may have been due in part to missing the earlier "aspect of my life," but that ultimately he "remembered, you know, pretty much why I stopped, which is that it really has nothing to do with that . . ." *Id.* at 59-60.

The DOE Counsel questioned the individual at the hearing as to why he would choose to use illegal drugs while holding access authorization. The individual responded, "I think the reason why I did that is because I knew that I was leaving [his DOE contractor position] . . . I know that that's not an excuse, . . . I wasn't thinking about the long-term consequences of what I did." *Id.* at 60-61. He acknowledged that it was "not right, and I know that that's where I made my mistake, but that's -- as far as I can remember, that's how I was approaching it at the time." *Id.* at 61.

By contrast, the individual describes himself as "just more cognizant of it now, especially, you know, going through this, and you really realize . . . how serious all this is." *Id.* at 50. He stated that he came "from an environment that's not like this at all, you know, most of my education is a completely different world" and that "given time to think about it and going through this, . . . this is just really driving home to me that it's something I do need to be cognizant of and something that . . . needs to be followed -- followed through on." *Id.* The individual testified that he now understands "more where those rules come from and why we have them, so that I have more respect for it than I used to." *Id.* at 72. In addition, the individual stated that he "definitely tr[ies] to avoid any type of situation where there could be people who are using drugs. . . . I wasn't as vigilant about it before as I am now, . . ." *Id.* at 49-50.

### **2. The Licensed Clinical Psychologist**

The licensed clinical psychologist who testified at the hearing examined the individual over a four-hour period on December 20, 2007, during which time the psychologist interviewed the

individual and administered a battery of psychological tests.<sup>3</sup> Exhibit A; Tr. at 124. The psychologist also reviewed the exhibits submitted by the DOE in this proceeding. Exhibit A. The results of the testing and the psychologist's testimony shed light on the circumstances and motivation for the individual's illegal drug use, both of which I am required by the regulations to consider, and provided information helpful to my evaluation of the likelihood that the individual will use illegal drugs or violate DOE's trust in the future.

First, the psychologist testified that the results of one of the tests administered, the Substance Abuse Subtle Screening Inventory, indicate that there is a low probability that the individual will use illegal drugs in the future. Tr. at 142; *See* Exhibit A at 10 (Personality Assessment Inventory "gives evidence of a similarly low probability of such difficulties"). Regarding the full battery of psychological tests administered, the psychologist explained, "[T]he question I ask myself is, 'Is this the kind of person . . . who shows psychological test results or scores which would suggest to me, or any similarly situated psychologist, that this was not a trustworthy human being?'" *Id.* at 108. There are, according to the psychologist, "specific elevations on specific scales that address itself to just that question; is this the kind of person who tends, as a characterological issue, to disregard convention, to disregard moral standards, to disregard law and behave any way they wish." *Id.* at 143. The psychologist testified that the results of the tests given to the individual "suggested to me that . . . he's not the kind of individual whom we would have predicted would do such a thing, and this is not the kind of individual we would predict would do such a thing in the future." *Id.* at 110.

I asked the psychologist whether there was "any reason to think that, had you evaluated him in 2002 or 2003, that the tests would have been able to predict that he would have in 2004 violated the drug certification?" *Id.* at 138. The psychologist responded that "assuming the test scores were the same, which I think in all likelihood they might have been, what I would have said was he does not show the kind of characterological structure that would lead me to be concerned about that." *Id.* at 138-39. The psychologist went on to describe the individual's violation of the drug certification as "an uncharacteristic error in judgment." *Id.* at 139.

As to what assurance there is that such an error in judgment will not occur in the future, the DOE Counsel asked the psychologist, "if he were to get a clearance back, how does DOE -- how would . . . they be reassured that it would be a safe bet, given what you've heard today?" *Id.* at 112. The psychologist responded, "Normal people learn from experience. Abnormal people do not. This is a normal individual, who has had one terrible experience, . . ." *Id.* In the opinion of the psychologist, the individual "has learned a great deal from this, both about himself and about the world that he inhabits and the world that he works in, . . . [The individual] has learned a very

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<sup>3</sup> The psychologist administered the Mini Mental Status Examination, the Reitan Indiana Aphasia Screening Test, the Bender Visual Motor Gestalt, Trail Making Parts A and B from the Halstead Reitan Neuropsychological Test Battery, the Wechsler Abbreviated Scale of Intelligence, the Test of Memory Malingering, the Substance Abuse Subtle Screening Inventory (SASSI), the Personality Assessment Inventory (PAI), and the Rorschach Test. Exhibit A.

significant lesson, and I would not expect to see any type of violation in the future.” *Id.* at 112-13.

### **3. The Individual’s Former Supervisor**

The individual’s former supervisor held the position of acting manager of the individual’s department from January 2007 through September 2007, during which time he was the individual’s direct line manager, though he also worked with the individual during his two-year postdoctoral position from 2002 to 2004, and has continued to work in the same department since September 2007. *Id.* at 75. He expressed his “very high regard” for the individual, with whom he works “very closely . . . on a number of research projects . . .” *Id.* at 77. Noting that scientists “hold integrity very high . . . , I thought he adhered to that level, you know, as well as anyone else I’ve ever worked with, or even better. So I’ve never had any -- had any reason to doubt his honesty or integrity.” *Id.*

Asked whether he noticed any change in the individual from the period when he was a postdoctoral associate, he stated, “I certainly think he’s matured even further as a scientist and as a colleague.” *Id.* at 84. He recalled that when the individual was leaving his employment with the contractor in 2004, “he was much more focused on [the] science, to now to where he’s matured and to where he’s looking at it from more of a professional programmatic standpoint, that this . . . is his career, and he really takes that seriously.” *Id.*

The former supervisor stated that he had no knowledge or reason to believe that the individual used cocaine or marijuana during the individual’s previous employment with the contractor, when they were colleagues, prior to individual’s departure in 2004. *Id.* at 83. Further, as a manager, the role he played as the individual’s supervisor through September 2007, were he to determine or find evidence that one of his employees were using an illegal drug, he “would certainly have to make sure that it was reported up the proper chain of command and consequences were issued for that.” *Id.* at 86.

### **4. The Individual’s Colleague**

The individual’s colleague testified that, during the individual’s 2002 to 2004 postdoctoral appointment, they became friends, “went to a few concerts together and been over to his house a couple of times, you know, was at a party for [another colleague], and then I see him all the time at work, because we’re right next door to each other.” *Id.* at 89. Nonetheless, he stated that he had no suspicions that the individual had used marijuana and cocaine near the end of his previous tenure with the DOE contractor in 2004, and has never observed the individual using illegal drugs. *Id.* at 91, 95.

In contrast to the individual’s former supervisor, when the individual’s colleague was asked if he saw any changes in the individual “that would cause us to think that he would behave differently in the future,” the colleague responded that the individual was “the same person to me.” *Id.* at

100. He noted that when the individual told him about the hearing and what he had done, he “was very surprised, because it just -- it just didn't seem consistent with his character that I know.” *Id.* He “very much” views the individual as an honest person, and has no concerns “whatsoever” about his honesty or trustworthiness. *Id.* at 90-91.

When I asked the individual’s colleague why the DOE should “trust him to honor his commitments to follow rules and regulations in the future given what he's done in the past,” he responded that he was glad he was “not the one having to make that judgment. I would think that it says a lot about his honesty and integrity that he did admit to it. I mean, that does say something. He could have attempted to cover it up.” *Id.* at 99. Finally, the individual’s colleague testified that the individual takes his job “seriously, and he takes a lot of pride in his research and the potential for what he can discover and the science that he can do.” *Id.* at 101.

### **C. Hearing Officer Evaluation of Evidence**

#### **1. Criterion K**

As discussed above in Section IV.A of this decision, the concerns raised in this case under Criterion K regarding the individual’s eligibility for access authorization are two-fold: First, the individual’s past criminal conduct raises questions about his ability or willingness in the future to comply with laws, rules, and regulations. Second, any future illegal drug use by the individual would impair his judgment, and therefore render him less reliable and trustworthy.

##### **a. Individual’s Ability or Willingness to Comply with Laws, Rules, or Regulations**

There is no question that the individual has in the past had an unacceptable attitude toward the use of illegal drugs. I am thoroughly convinced, however, that this attitude has never been reflective of a general attitude on the part of the individual of disregard for the rules governing his conduct. For example, he clearly took seriously his responsibility to honestly disclose his drug use on both his 2002 and 2006 QNSPs, and these self-reports, along with my assessment of his demeanor in testifying at the hearing in this matter, lead me to conclude that he has always taken very seriously his obligation to, without hesitation, provide accurate information to the DOE, regardless of the consequences. *See Revised Adjudicative Guidelines* at para. 2(e)(2) (“adjudicator should consider whether the person . . . was truthful and complete in responding to questions; . . .”).<sup>4</sup> In this regard, I note that the individual reported on his 2002 QNSP his drug

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<sup>4</sup> In a number of prior cases, such candor has been found to be a mitigating factor. *E.g.*, *Personnel Security Review* (Case No. VSA-0229), <http://www.oha.doe.gov/cases/security/vsa0229.htm> (1999) (individual voluntarily reported lapse of judgment; unlike in most cases, no independent basis to suspect illegal drug use; had he not disclosed, unlikely it would have come to light); *Personnel Security Hearing* (Case No. VSO-0313), <http://www.oha.doe.gov/cases/security/vso0313.htm> (2000) (affirmed by OSA 2000); *Personnel Security Hearing* (Case No. VSO-0394), <http://www.oha.doe.gov/cases/security/vso0394.htm> (2001) (affirmed by OSA 2001); *Personnel Security Hearing* (Case No. VSO-0430), <http://www.oha.doe.gov/cases/security/vso0430.htm> (2001) (affirmed by OSA 2001) (“the Individual reported his June 1997 marijuana use, despite the unlikelihood that it

use going back to 1993, even though the questionnaire only asked about his use over the previous seven years. DOE Exhibit 12 at 8.<sup>5</sup>

My opinion as to the individual's general regard for the rules governing his conduct is also supported by the testimony provided at the hearing, both by the individual's colleagues, *see, e.g.*, Tr. at 100-01, and more importantly by the testimony of the psychologist who evaluated the individual. As noted above, in describing the psychological tests given to the individual, the psychologist referred to "specific elevations on specific scales that address itself to just that question; is this the kind of person who tends, as a characterological issue, to disregard convention, to disregard moral standards, to disregard law and behave any way they wish," and the psychologist testified that there was no such evidence of these traits in the case of the individual. *Id.* at 143.

The psychologist also found with reference to the tests he administered to the individual, "no signs whatsoever on the psychological testing which were suggestive of a characterological disturbance or personality disorder of a type that would normally be associated with an individual being dishonest and untrustworthy," and that, in fact, "none of those scales were in the least bit elevated, suggesting that [the individual] does not have the type of personality structure of an individual who would be inclined to behave in an untrustworthy or dishonest manner." Exhibit A at 10. While there is no specific allegation in this case of an underlying personality disorder that would predispose the individual to exhibit untrustworthy or dishonest behavior, I consider the confirmation of the absence of such a disorder to be a mitigating factor.<sup>6</sup>

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would otherwise have come to the DOE's attention"). By contrast, in many cases involving the violation of a DOE drug certification, the violation does not come to light through the individual's admission. *E.g.*, *Personnel Security Hearing* (Case No. TSO-0527), <http://www.oha.doe.gov/cases/security/tso0527.pdf> (2008) (positive drug test); *Personnel Security Hearing* (Case No. VSO-0540), <http://www.oha.doe.gov/cases/security/vso0540.pdf> (2002) (drug arrest).

<sup>5</sup> It would certainly augur more favorably for the individual's future behavior had he voluntarily reported his violation of the DOE drug certification immediately after it took place, without the prompting of questions from the DOE on a QNSP. However, it is worth noting that the individual in this case did not conceal this violation over a long period of time while continuing to hold a security clearance, as his first violation was in May 2004 and his clearance was terminated in July 2004, when he left his employment with the DOE contractor for another postdoctoral appointment. Upon returning to work for the contractor in December 2006, he reported the violations on a QNSP that same month. On this point, the facts in this case compare favorably to some of the previous cases where the security concerns raised by the violation of the drug certification have been sufficiently resolved. *See, e.g.*, *Personnel Security Hearing* (Case No. TSO-0148), <http://www.oha.doe.gov/cases/security/tso0148.pdf> (2005) (individual held clearance for six years after violation of drug certification before reporting to DOE); *Personnel Security Hearing* (Case No. TSO-0079), <http://www.oha.doe.gov/cases/security/tso0079.pdf> (2004) (four years); *Personnel Security Hearing* (Case No. VSO-0547), <http://www.oha.doe.gov/cases/security/vso0547.htm> (2002) (affirmed by OSA 2005) (six years); *Personnel Security Hearing* (Case No. VSO-0430), <http://www.oha.doe.gov/cases/security/vso0430.htm> (2001) (affirmed by OSA 2001) (two years); *Personnel Security Hearing* (Case No. VSO-0313), <http://www.oha.doe.gov/cases/security/vso0313.htm> (2005) (affirmed by OSA 2000) (one year).

<sup>6</sup> During his cross-examination of the psychologist, the DOE counsel read from a magazine article that had been inserted into the Congressional Record at the request of a United States Senator in 1991. This article was not

In addition to these test results, there is the testimony of the lay witnesses at the hearing, who expressed high regard for the individual, and no concern or doubt as to his honesty, integrity, or trustworthiness. Tr. at 77, 100. Moreover, there is no evidence in the present case that the individual's disregard for drug laws was indicative of a pattern in the individual's life of disregard for other laws, for the law in general, or in particular for any laws relating to national security. Tr. at 72. Clearly, the individual's past violations of the law are limited solely to his use of illegal drugs.

These conclusions regarding the individual's enduring character traits obviously cannot guarantee that the individual will never violate a rule in the future, a fact to which the psychologist readily admitted. *Id.* ("Does that mean that that person won't or can't break the law? In this case, he did."). This, however, in no way diminishes the value of the results of the psychological testing, the opinion of the psychologist, or my and the individual's colleagues' personal assessment of the individual, all of which support the conclusion that the individual's past violations of the laws prohibiting his use of illegal drugs are not indicative of whether the individual would have in the past, or will in the future, violate other laws, rules, or regulations.

#### **b. Risk of Future Illegal Drug Use**

In evaluating whether the concern regarding the risk of future illegal drug use has been sufficiently mitigated, I note that it has been over three years since the individual last used illegal

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identified prior to the hearing as an exhibit by the DOE counsel, and was not offered as an exhibit at the hearing. The article related the story of a former CIA employee who, after being fired from the CIA, ultimately fled to the then Soviet Union, and was later charged with espionage by the U.S. government. After leaving the CIA, but prior to fleeing to the Soviet Union, this individual began to have problems with alcohol, and after getting into an altercation in which he shot a gun at others, he pled guilty to aggravated assault and was sentenced to five years probation. While the individual was on probation, in 1984, the psychologist who testified in the present case was tasked by the court to conduct a psychological evaluation of the individual. In his report, the psychologist stated that the individual was "not otherwise criminally oriented." The DOE counsel argued that this information was relevant to the present case because both cases involve "a future predictability issue." Tr. at 127.

There are several reasons why I accord this information very little, if any, weight in the present case. First, the evaluation in question took place approximately 24 years ago. Second, the psychologist convincingly distinguished that case, which did not involve the eligibility of an individual for a DOE security clearance, from the present case. He noted that his 1984 evaluation was "not nearly as detailed" as in the present case, *Id.* at 131, that it relied on a testing instrument, the Minnesota Multiphasic Personality Inventory, which he no longer uses because the results of the test "can be altered if a person wished to alter it," and that he "didn't even know that he'd ever worked for the CIA. If I don't know things, I can't possibly deal with them." *Id.* at 131, 132. Finally, in this case, I am not relying on the opinion of the psychologist as a perfect predictor of the future, which the psychologist readily admits he is not. *Id.* at 117-18, 131-32. Instead, I consider his opinion as evidence that provides some indication as to how the individual is *likely* to behave in the future, in the same way that psychiatric and psychological expert opinions have been relied upon in many prior Part 710 cases. As such, the information presented by the DOE Counsel has very little bearing on the general ability of the psychologist, whose notable qualifications and long experience are not in question here, Exhibit B, to conduct a detailed evaluation of an individual and opine on his likely future behavior, as he and other psychologists and psychiatrists have done in prior cases before this office. *Id.* at 104.

drugs, and this is a factor in the individual's favor. I also note, however, that the individual was 30 years old in January 2005 when he last used illegal drugs. I therefore cannot dismiss this behavior as a youthful indiscretion that would be more easily mitigated by the passage of time.

Nonetheless, the circumstances surrounding the conduct indicate that the individual was still in a transitional period in his life, at the end of long period of education, prior to holding his first permanent full-time career position. Notably, his drug use ceased voluntarily well before his return to employment with the DOE contractor. See *Personnel Security Hearing* (Case No. TSO-0225), <http://www.oha.doe.gov/cases/security/tso0225.pdf> (2005) ("individual chose to stop using marijuana on his own"). The individual convinced me that he now takes his work and career very seriously. *E.g.*, Tr. at 52. Both his colleague and his former supervisor confirmed this fact. *Id.* at 84, 101.

Moreover, I was impressed by the testimony of the psychologist, who opined, based on the psychological testing he administered to the individual, that there is a low probability that he will use illegal drugs in the future. Tr. at 142; Exhibit A at 10. There was also persuasive testimony from the psychologist as to the impact of events that have occurred since the individual's prior drug use. The psychologist testified that the individual was suffering from an "adjustment disorder with mixed anxiety and depressed mood," a clinical description of what "normal people experience when things hit them pretty hard, . . ." *Id.* at 106.<sup>7</sup> As the psychologist put it, "Normal people learn from experience. Abnormal people do not. This is a normal individual, who has had one terrible experience, and my suspicion -- my sense of it is that he has learned a great deal from this." *Id.* at 112.

The current administrative review process has clearly made very real for the individual just how seriously the DOE takes his commitment, and therefore how seriously he must take it. Compounding this sobering effect is the fact that the stakes are now, with the individual in a permanent position and his career on the line, much higher than they were in 2004. Taking into account these and all of the other factors discussed above, I find that the risk that the individual will use illegal drugs in the future has clearly declined in the time since he stopped his drug use in 2005, in part due to the passage of time, and in part because of the changed circumstances in which he finds himself, and lessons he has learned in the interim.

In the end, however, there remains the fact that the individual has a substantial history of illegal drug use and although he refrained from using illegal drugs for nearly two and one-half years from December 2001 to May 2004, he began to use them again, despite having signed a security acknowledgment confirming his understanding that any involvement with illegal drugs could result in the loss of his DOE access authorization. Exhibit 9. Unfortunately, the passage of time and the significantly changed circumstances of his employment with a DOE contractor and as a

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<sup>7</sup> The psychologist emphasized that "there is no data to suggest that this is a person predisposed towards depression or anxiety-related disorders," *id.* at 110, and there is no allegation in this case that the individual's adjustment disorder is an "illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h).

holder of a security clearance were, in May 2004, not sufficient to ensure the individual would not return to using illegal drugs. For these reasons and those discussed in Section IV.C.2 below, I find that the risk of future drug use by the individual has not been sufficiently mitigated, a finding further supported by the fact that the individual used illegal drugs on at least four occasions in 2004 in violation of the written commitment that he made to the DOE in November 2002 as a condition of receiving his security clearance.

## **2. Criterion L**

As with Criterion K, there is under Criterion L both a specific concern that the individual will again use illegal drugs, and a more general concern regarding the individual's future trustworthiness and reliability. First, future use of illegal drugs would likely impair the individual's judgment and, because of the illegal nature of such activity, would subject him to "pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). Second, there is a broader concern that the individual's past criminal behavior may indicate "that the individual is not honest, reliable, or trustworthy; . . ." *Id.* With regard to both of these concerns, all of the factors considered in the previous section also apply to my evaluation of this case under Criterion L, and need not be repeated here.

However, there is an additional factor in this case, specific to Criterion L, that substantially amplifies these concerns: the individual's violation of the DOE drug certification, i.e., the "commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." *Id.* The drug certification is unique and significant for at least two reasons. First, unlike the drug laws that apply to everyone, or the security acknowledgement that applies to all clearance holders, the drug certification represents a personal commitment by the individual to the DOE to refrain from the use of illegal drugs. Second, the individual was essentially put on notice that, but for this personal commitment, his prior extensive drug use would have precluded him from holding a clearance.

The individual apparently adhered to this commitment for one and one-half years, but then chose to violate it at least four times, demonstrating that his willingness to use illegal drugs trumped not only the generally-applicable laws prohibiting their use, but more critically, the personal commitment he made to the DOE, and upon which DOE relied upon to find him eligible for access authorization in the first place. This obviously raises serious concerns under Criterion L that go beyond those discussed above under Criterion K, both as to the likelihood that the individual will use illegal drugs again while holding a clearance, and as to the risk that the individual will again place his interests above those of the national security in some other respect.

As for the individual's general honesty, trustworthiness, and reliability, I find those concerns have been sufficiently mitigated for the reasons discussed in the previous section. Regarding his honesty, for example, the individual has proven that he can be relied upon to provide accurate

information to the DOE, regardless of the personal consequences. More generally, the individual's past transgressions are solely related to his use of illegal drugs,<sup>8</sup> and the testimony of the expert and lay witnesses cited above indicates that the individual's illegal drug use is not reflective of his character generally as to trustworthiness or reliability.

Again, however, as with Criterion K, the graver concern under Criterion L is that the individual will again use illegal drugs. Neither the testimony of the lay witnesses nor the expert testimony as to the individual's general personality and character are particularly helpful to the individual in this regard, since both would have in all likelihood been the same prior to his violation of the drug certification in 2004, i.e., predicting, incorrectly, that he would not use illegal drugs in the future.

I appreciate the fact that the individual now finds himself in different circumstances, both in his career, and because of the impact that the present proceeding has had upon him. But one would have assumed, again incorrectly, that the need for, and requirements of, the drug certification in 2002 would have been sufficient to impress upon the individual the seriousness with which the DOE regards the use of illegal drugs by those holding access authorization. Thus, while I concur with the DOE psychologist that the probability of the individual using illegal drugs again is low, I am not convinced that, at this time, the risk is sufficiently low to warrant again granting him access authorization.

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<sup>8</sup> The absence of any derogatory information regarding an individual aside from the violation of a drug certification has been found to be a mitigating factor in a number of prior cases. *Personnel Security Hearing* (Case No. TSO-0324), <http://www.oha.doe.gov/cases/security/tso0324.pdf> (2007); *Personnel Security Hearing* (Case No. TSO-0172), <http://www.oha.doe.gov/cases/security/tso0172.pdf> (2005); *Personnel Security Hearing* (Case No. TSO-0173), <http://www.oha.doe.gov/cases/security/tso0173.pdf> (2005); *Personnel Security Hearing* (Case No. TSO-0110), <http://www.oha.doe.gov/cases/security/tso0110.pdf> (2005); *Personnel Security Hearing* (Case No. VSO-0229), <http://www.oha.doe.gov/cases/security/vso0229.htm> (1998); *Personnel Security Hearing* (Case No. VSO-0208), <http://www.oha.doe.gov/cases/security/vso0208.htm> (1998); *Personnel Security Hearing* (Case No. VSO-0208), <http://www.oha.doe.gov/cases/security/vso0208.htm> (1998); *Personnel Security Hearing* (Case No. VSO-0173), <http://www.oha.doe.gov/cases/security/vso0173.htm> (1998); *Personnel Security Hearing* (Case No. VSO-0163), <http://www.oha.doe.gov/cases/security/vso0163.htm> (1997); *Personnel Security Hearing* (Case No. VSO-0045), <http://www.oha.doe.gov/cases/security/vso0045.htm> (1995).

## **V. Conclusion**

In the present case, I find that there is evidence that raises a substantial doubt regarding the individual's eligibility for access authorization, and that the concern raised by that evidence has not yet been sufficiently mitigated. I therefore cannot conclude, "after consideration of all the relevant information, favorable and unfavorable," that granting the individual's "access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. §§ 710.7(a), 710.27(a). The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Steven J. Goering  
Hearing Officer  
Office of Hearings and Appeals

Date: July 17, 2008